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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 327

EMPRESA SIDERURGICA, S. A., A CORPORATION OF COLOMBIA, SOUTH AMERICA, AND VANDERBURGH & CO., INC., A CALIFORNIA CORPORATION,

Appellants,

vs.

COUNTY OF MERCED, A MUNICIPAL CORPORATION, J. EMMETT McNAMARA, ASSESSOR OF THE COUNTY OF MERCED, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT AS TO JURISDICTION

SCOTT D. KELLOGG,
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STATUTES CITED

California Revenue and Taxation Code:
Section 103 5
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Section 201 5
Section 202 5
Section 405 5
California Rules on Appeal, Rule 24 6
Constitution of the United States, Article I, Section 10, Clause 2 6, 7
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STATEMENT AS TO JURISDICTION

Statement of Federal Question Involved in the Appeal

The question presented by this appeal is whether the California Revenue & Taxation Code, Division I, as amended, construed, applied and enforced, to permit and require a personal property tax upon a portion of an entire and complete cement manufacturing plant which, on the first Monday in March (March 5, 1945), was being exported from California to Colombia, South America, and which

was so exported, is repugnant to Article I, section 10, clause 2 of the Constitution of the United States.

Statement of the Case

In November, 1944, appellant Empress Siderurgica, S. A., a corporation of Medellin, Colombia, South America, entered into a contract to purchase a cement manufacturing plant known as the Yosemite Portland Cement Plant. (Tr. 34-35, 42-53) [1] The contract provided for the passage of title to the entire cement plant upon the occurrence of two conditions; namely, (1) the issuance of an export license by the federal government, and (2) the establishment of a letter of credit in payment. The contract also provided for the employment of an export forwarding agent to effect the exportation of the entire cement plant. (Tr. 37, 48)

Pursuant to the contract, appellant Vanderburgh & Co., Inc., an export forwarding agent, was employed. (Tr. 35) Vanderburgh employed Bigge Drayage Co., a contractor and a licensed common carrier by motor vehicle in interstate and foreign commerce, to dismantle, package and deliver the cement plant to the railroad carrier. (Tr. 35, 54-75)

On December 15, 1944, the U. S. Foreign Economic Administration issued Export License SP No. 2086 (Tr. 38, 104) and on January 3, 1945, the letter of credit was established covering the balance of the purchase price. (Tr. 38, 105-109) Thereupon, on January 3, 1945, title passed pursuant to the contract, and the entire cement plant was delivered to purchaser, the export forwarding agent, and Bigge, at which time dismantling, packaging and shipping operations commenced. (Tr. 39)

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[1] References to the facts stated, unless otherwise noted, will be to the pages of the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California, and which is included in the transcript certified to this Court.

From the date of passage of title to appellant Empresa Siderurgica, S. A. on January 3, 1945, to the date when the last of the cement plant left the United States on January 29, 1946, the respective activities of the export forwarding agent, the contractor, the railroad carrier, and the steamship carrier, consisted of one integrated and continuous operation in effecting the exportation of the entire and complete cement plant. (Tr. 39, 41)

On March 5, 1945, while the exportation was being carried out and after 14 carloads of the cement plant had left Merced County, the Assessor of said County assessed a personal property tax on the whole of the cement plant. (Tr. 39-40, 112) Thereafter, when appellants pointed out to the Assessor and District Attorney of Merced County that 14 carloads were out of the County on the tax date, the Assessor and District Attorney requested the Board of Supervisors to correct the Assessment roll reducing the assessment by 12%, which was done. (Tr. 40-41, 117) Then, on August 31, 1945, the appellants paid the tax of $7,999.20 under protest, a copy of the protest being attached to the Complaint as Exhibit "A". (Tr. 40, 12-22, 116) Thereafter, appellants instituted this suit in the Superior Court of the State of California in and for the County of Merced to recover the tax paid. (Tr. 41, 1-11)

The County and the Assessor thereof filed an answer to the Complaint admitting all of the averments other than that the property assessed was in interstate or foreign commerce and was an export. (Tr. 23-27)

The case was tried on a stipulation and agreed statement of facts. (Tr. 33-41)

Opinions Below

The trial court rendered an opinion (Tr. 134-146, a copy of which is attached as Appendix "A") in which the court

determined that on the tax assessment day, the entire plant was an export, and entered Findings of Fact (Tr. 149-151) from which the court made the following Conclusions of Law (Tr. 151-152):

"I

"That on March 5, 1945, the proposed exportation of the cement plant was in process of execution and that before and on that day the plant and the parts thereof were moving or being made to move toward Colombia, South America.

"II

"That on March 5, 1945, the cement plant and the parts thereof were so definitely committed to exportation and had advanced so far in the execution of a planned and finally accomplished exportation that its taxation was prohibited by Article I, Section 10, Clause 2 of the Constitution of the United States.

"III

"That the attempted taxation of the cement plant and the parts thereof as attempted by defendants was without authority of law and void under the provisions of the Constitution of the United States."

Judgment was entered accordingly for appellants.

The appellees duly appealed to the Supreme Court of California. The Federal questions herein considered were urged in the briefs of both parties.[2]

On June 15, 1948, the Supreme Court of California rendered its decision in bank reversing the judgment of the Superior Court. This decision has not yet been officially reported. It is unofficially reported in 32 A.C. 95 and 194 P. 2d (Adv.) 527. A copy of said opinion is attached hereto as Appendix "B".

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[2] Under the California practice, there is no assignment of error; the questions presented are set forth only in the briefs.

Statutory Provisions Sustaining Jurisdiction

The statutory provisions believed to sustain the jurisdiction of this Court is Section 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and the Act of January 31, 1928 (28 U. S. C. 344 (a), 861a).

State Statute Involved

The statute of the State of California, the validity of which is involved, is the California Revenue and Taxation Code, Division I, entitled "Property Taxation", enacted 1939, as amended and in effect on March 5, 1945.

The pertinent sections of the Code involved in this appeal are set forth as follows:

> "Section 201. All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this code."
>
> "Section 103. 'Property' includes all matters and things, real, personal, and mixed, capable of private ownership."
>
> "Section 106. 'Personal property' includes all property except real estate."
>
> "Section 405. Annually, the assessor shall assess all the taxable property in his county, except State assessed property, to the person owning, claiming, possessing, or controlling it at 12 o'clock meridian of the first Monday in March. . . ."[3]
>
> "Section 202. The exemption of the following property is as specified in section 1 of Article XIII of the Constitution:
>
> . . . . . .
>
> "(c) Property that is exempt under the laws of the United States."[3]

[3] There are other provisions in Sections 202 and 405 which are not set out because not applicable to any of issues involved in the case.

Date of Judgment and Application for Appeal

The decision of the Supreme Court was filed on June 15, 1948. Under the California Rules on Appeal, the appellants had fifteen days within which to petition for a rehearing (Rule 27 (b)), and appellants duly filed its petition on the 30th day of June, 1948. On July 8, 1948, the Supreme Court denied a rehearing and the decision became final. See:

Rule 24 of California Rules on Appeal;

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 72-74.

The application for appeal was presented August 19, 1948.

Raising the Federal Question

The complaint in the trial court, in addition to incorporating the protest filed at the time the tax was paid under protest, (in which appellants asserted that the California Statute if construed, applied or enforced in such manner as to impose a tax on the said cement plant was in contravention of the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States, Tr. p. 14) directly averred in Paragraph XI:

> "That the said tax was and is an unlawful tax on the personal property of Plaintiffs and was illegally levied and placed upon the tax roll of the said County of Merced under color of law therefor. That the imposition of the said personal property tax is an untax on the following grounds:
>
> "(1) That the property assessed by this said personal property tax and for which payment under protest was made as aforesaid, was at the time of the assessment of this tax and ever since has been an export and as such was and is exempt from taxation by the State of California and or the County of Merced under the provisions of Article I, Section 10, Clause 2 of the Constitution of the United States,

which prohibits taxation of exports by the states; and the said property was not properly subject to taxation by the State of California and or the County of Merced under Article XIII, Section 1 of the Constitution of the State of California and Section 202 of the Revenue and Taxation Code of the State of California. . . .

"(2) That the property assessed by this personal property tax and for which payment under protest was made, as aforesaid, was at the time of assessment of this tax in the hands of a common carrier and was and is property or commodities entered and moving in the course of transportation in foreign commerce, and as such, was and is exempt from taxation by the State of California and or the County of Merced under the provisions of Article I, Section 8, Clause 3 of the Constitution of the United States and under Article XIII, Section 1 of the Constitution of the State of California, and Section 202 of the Revenue and Taxation Code of the State of California; and that such taxation constituted and does constitute an interference with goods entered and moving in the course of foreign commerce." (Tr., pp. 6-8.)

In the final decision of the Supreme Court of the State of California, it is said:

". . . Empresa maintains that, at the time of the assessment, the plant was an export. . . ."

* * * * * * * * *

"Article I, section 10, clause 2, of the Constitution of the United States provides: 'No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports. . . .' The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export."

* * * * * * *

"The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained."

Empresa Siderurgica v. *County of Merced*, 32 A. C. 95; 194 P. 2d (Adv.) 527.

Cases Believed to Sustain Jurisdiction

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 74;

Gulf Refining Co. v. *United States*, 269 U. S. 125, 136;

Standard Oil Company v. *Johnson*, 316 U. S. 481, 482-483;

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 289;

First National Bank v. *Anderson*, 269 U. S. 341, 345-346;

U. S. v. *County of Allegheny*, 322 U. S. 174, 192;

Chicago, etc., Co. v. *Perry*, 259 U. S. 548, 551;

Sully v. *American National Bank*, 178 U. S. 289, 298;

Hickox v. *State of Mississippi*, 292 U. S. 393, 394;

Whitfield v. *Ohio*, 297 U. S. 431, 435-436.

Statement of Grounds upon Which it Is Contended the Questions Involved Are Substantial

The final decision of the California Supreme Court based its conclusion that the statute as construed was not repugnant to the Constitution upon 4 grounds:

(1) Delivery of possession to export forwarding agent was not the equivalent of delivery to a common carrier for transportation.

(2) Delivery of possession to Bigge was not the equivalent to delivery to a common carrier for transportation.

(3) Appellants' argument that because 12% of the plant had been shipped out of the country and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained.

(4) The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country.

All four of the above referred to grounds are based upon only one basic conclusion:

That there must be delivery to a common carrier before the cement plant or any part thereof becomes an export.

It is submitted that all four grounds as well as the basis therefor are erroneous and contrary to the unbroken line of decisions of this Court.

The decision of the California Supreme Court that there must be delivery to a common carrier before the cement plant or any part thereof becomes an export would practically destroy the constitutional prohibition against state taxation of exports.

If this decision be allowed to stand and thus to establish the law that the exportation of goods, sold under a contract calling for their exportation, has not commenced until the goods have been completely loaded on the cars of a railroad common carrier which is to transport them to the seaboard for shipment abroad, it is apparent that the constitutional inhibition against State taxation of exports is of no practical value. Such a rule would defeat the very object sought to be effected by the Constitution. If, as held by the opinion of the California Supreme Court, goods are not in the process of exportation until after they have been first loaded on the cars of a common carrier, any state, although the goods

were in the process of exportation, could, as they did before the Constitution, levy any taxes on goods not actually loaded on a common carrier. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 76-78;
United States v. *Hvoslef*, 237 U. S. 1, 13;
Fairbank v. *United States*, 181 U. S. 283, 292-293;
Thames & Mersey Ins. Co. v. *United States*, 237 U. S. 19, 27.

The decision of the Supreme Court of California is contrary to the unbroken line of decisions of this Court that the exportation of goods commences with their first movement towards the sea. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 81;
A. G. Spalding & Bros. v. *Edwards*, 262 U. S. 66, 68-69.

The decision of the Supreme Court of California is also contrary to the unbroken line of decisions of this Court that the law is not concerned with the means of shipment where the means chosen guarantee continuity of the export and foreign delivery in good faith and the Constitutional prohibition gives immunity from taxation to the process of exportation and to the transactions and documents embraced in that process. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 81-82, 83;
Willcuts v. *Bunn*, 282 U. S. 216, 228.

The trial court found the facts to be as stated in the Stipulation and Agreed Statement of Facts upon which the case was tried; that the cement plant was purchased by appellant Empresa, a Colombian (South America) corporation; that it was purchased for the purpose of exporting it to Colombia, and it was finally so exported. That in pursuance of its purpose to export the cement plant, the appellant Empresa paid for the cement plant and took possession; employed an export forwarding agent; employed Bigge Drayage Co.

to dismantle the cement plant and attend to its shipment; obtained an export license; and that prior to March 5, 1945, part of the plant had already been shipped and the balance was in the process of exportation. (Tr. 149-151, 33-41).

From these facts and applying the rules set forth in the then recent case of *Richfield Oil Corp.* v. *State Board* (329 U. S. 69) the trial court concluded in its written opinion that the exportation of the cement plant commenced when the appellants took delivery and Bigge began dismantling the building. (Tr. 143).

It is submitted that this view is correct and in accord with the decisions of this Court. Further, the opinion of the Supreme Court of California entirely ignored the essential character of the transaction.

The Constitution prohibits a tax upon an export without regard to the technical procedures by which it is effected and the question as to whether goods are exports is to be determined from an examination of the entire transaction, the substance, not the form, controls. See:

Richfield Oil Corp. v. *State Board*, 329 U. S. 69, 83;
A. G. Spalding & Bros. v. *Edwards*, 262 U. S. 66, 69-70;
Hooven & Allison Co. v. *Evatt*, 324 U. S. 652, 662-663;
Carson Petroleum Co. v. *Vial*, 279 U. S. 95, 103.

The Federal Question Involved Is One of Vital Public Interest

While the amount sought in the suit involves a tax of principal and interest of over $8,000, there is pending and awaiting final determination of this suit, a sales tax based on the sale price of the cement plant which is approximately double the aforementioned amount.

But of far greater importance to the public is the fact that the decision must affect every future export sale in all of the States.

Conclusion

It is respectfully submitted that the federal question involved is substantial and of exceptional public interest and importance; and that this Court has jurisdiction of the appeal.

Dated: Oakland, California, August 19, 1948.

Respectfully submitted,

SCOTT D. KELLOGG,
Counsel for Appellants,

Appendix "A"

DECISION OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF MERCED

January 31, 1947.

PETER J. SHIELDS, *Judge:*

The Plaintiff, a corporation existing and located in Colombia, South America, entered into a contract with the Henry J. Kaiser Co. on November 11th, 1944, for the purchase for exportation of a cement plant located in Merced County, California. The plant was complete and fully equipped for immediate operation in the manufacture of cement. In preparation for this export the plaintiff on December 2, 1944 employed Vanderburgh & Co., Inc., a California corporation, as its forwarding agent to effect its contemplated export. On the same day Vanderburgh & Co., Inc., employed the Bigge Drayage Co. to dismantle the plant and to take the first steps looking to its shipment to its purchaser in South America.

On December 15th, 1944 a license was obtained from the United States Foreign Economic Administration approving the export of this property as contemplated by the parties. The entire sale was made contingent upon the issuance of this license.

On January 3rd 1945 the Henry J. Kaiser Company was advised that a credit had been opened in their favor for the account and on behalf of plaintiff thus effecting full payment for the plant.

On the same day, January 3, 1945, Vanderburgh & Co., Inc. and the Bigge Drayage Co. entered into possession of the property and began dismantling and crating it preparatory to shipment. This work proceeded until on March 5th, 1945, the date upon which personal property taxes are levied in California, the County of Merced levied a tax upon the parts of the cement plant which were then in that County. This tax was paid by plaintiff under protest and this is an action brought for its recovery. On the 5th day of March, the day upon which the tax was levied the condition of the

plant resulting from plaintiffs work of demolition and shipment was as follows:

1. 12% of the plant had been torn down, crated and shipped away.

2. 10% had been dismantled, crated and made ready for shipment.

3. 34% had been dismantled but not crated and its parts were lying about the premises.

4. 44% not dismantled; standing in place.

By January 18, 1946 the entire plant had been shipped out of Merced County and by January 29th following the entire plant had been shipped out of the State of California and out of the United States. The sole question for decision in this case is, had the entire property of the cement plant become "export" prior to March 5th, 1945 or did the part of it which remained in Merced County on that day retain its character as part of the general property of the County?

Many cases have been decided relative to this question as it arose under the Commerce Clause of the Constitution. But in the very recent case of Richfield Oil Company *v.* State Board of Equalization, not yet reported, but decided November 25, 1946, the Court felt compelled to state "There are few decisions of the Court under Article 1, Section 10, Clause 2 (of the Federal Constitution) which illuminate the problem". The question is at what moment does any portion of the general property of the State which may be intended for export or for the exportation of which a contract has been made becomes "export" and ceases to be such general property and exempt from local taxation. This is substantially a question of fact and in determining it the Courts are not concerned with mere formalities but by matters of substance. The very early case of Coe *v.* Errol, 116 U. S. 517 which involved the commerce clause of the Constitution but which stated a rule which has been adopted as a measure where the Export-Import clause was in question, to the effect that "goods do not cease to be part of the general mass of property, in the State, subject as such to its jurisdiction, and to taxation in the usual way until they

have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

This rule has been so universally established that citations supporting it are unnecessary. It is enough to say that it was approved and applied in the Richfield case above cited. The delivery of goods to common carriers mentioned in the *Coe v. Erroll* case are not ends in themselves; the ultimate fact in all of these cases is, had the thing which has been done in the execution of the undertaking or contract of export resulted in committing the goods so definitely to export that the power of the exporter to defeat it is ended and that the goods may be said beyond any reasonable probability to have been so committed to exportation that there is a substantial certainty that their export will be completed. All of the cases require that something must have been done in furtherance of the export by which it can be said that the goods have "been started upon" transportation. Some of the cases say that commerce does not begin until actual delivery has been made to a common carrier. But this is not essential. Such delivery is only one of the ways in which the devotion of goods to export may be accomplished.

"The certainty that goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved" Richfield Oil Corp. *v.* State Board of Equalization, above.

In cases where delivery of the goods to a common carrier has been made, as stated by Chief Justice Taft, the decision is easy. "It is much more difficult" where the movement has been attended by other circumstances, or effected by other means.

Hughes Bros. v. Minnesota, 272 U. S. 469.

The question always remains, were the goods at the time a tax upon them is attempted, so definitely committed to export that the parties to the transaction have lost the power to recall the goods or to devote them to a domestic use. There is no hard and fast rule by which the character of goods claiming the protection of Article 1, Section 10

Clause 2 of the Constitution can be unfailingly tested. Under this provision "we are concerned with matters of substance, not of form—the extent of its (the goods) immunity from state taxation turns on the essential nature of the transaction considered in the light of the Constitutional purpose and not on the formalities with which the importation (exportation) is conducted" Hooven *v.* Evatt 324 U. S. 652, Western Oil Co. *v.* Liscome 244 U. S. 346, where the Court say "as this Court often has said it is the essential character of commerce—that is decisive".

In considering what so committed goods intended for export to a condition which it was held that their exportation was made reasonably certain many circumstances have been held to be sufficient which were less persuasive than the facts in this case.

In Clarke *v.* Clarke, 3 Woods, 408, logs collected by a Georgia exporter and purchased for export, while still in port on the land in his possession and not sold at the time the tax was levied were held exempt where the logs had been subsequently exported. It will be noted that the logs had not been actually exported they had not even been sold for export, but the circumstances showed that they had definitely been devoted to exportation. In Texas Co. *v.* Sabine Tram Co. 227 U. S. 111, lumber was shipped to a small seaport town. It was purchased for export but it had not been sold and no particular lumber set apart for any prospective purchaser but was selected and loaded as vessels arrived. The fact that the town was very small and the lumber far beyond its economic needs was given consideration in determining the improbability that the lumber would not be exported. In Hughes Bros. *v.* Minnesota the Court considered the fact that if a change of purpose to export was made, that it would involve a breach of contract. The Hughes Bros. case is relevant here in another way. In that case pulp wood logs had been sold in Minnesota for transport to another state, the transportation to be made by floating the logs down a small river to its connection with another. In preparation for the delivery the timber was logged and the logs taken down to the stream and placed, some of them on the ice and the balance on the bank, awaiting the breaking up of the ice. The ice broke April 29th

"when the drive of the logs began, those on the ice moved by themselves and those on the bank were pushed in". The decision does not state how long it took to "push" in the logs. There were 10,000 cords of these logs and it is quite improbable that they had all been floated before May 1st which was the day upon which they were attempted to be taxed. No question of dividing the tax was raised; it seemed to be conceded that the movement of some of the logs was a beginning of a movement of them all. This would be determinative of the tax in the case before me so far as the ten per cent of the plant which was crated was concerned. When the twelve per cent was shipped it was part of a movement of all the rest, like the logs on the bank, which was crated and ready for shipment as transportation could be had.

It is an admitted fact in this case that the contemplated export of this plant was finally completed. "There has been a liberal construction of what is continuity of the journey in cases where the Court finds from the circumstances that export trade has been actually intended and carried through" Carson *v.* Vial 279 U. S. 95, 103.

The rule of decision announced in Hughes Brothers *v.* Minnesota is singularly applicable to the case under discussion. There as hereinbefore stated certain logs had been sold for delivery by floating to another state. The logs had been taken to the bank of the stream where some of them had been placed on the ice and the remainder had been piled on the banks. The question was whether or not the logs had become the subject of interstate commerce before the levy of a certain tax upon them. In the course of its decision the Court said: "The conclusion in cases like this must be determined from the various circumstances. Mere intention by the owner ultimately to send the logs out of the state does not put them in interstate commerce, nor does preparatory gathering for that purpose at a depot. It must appear that the movement for another state has actually begun and is going on. Solution is easy when the shipment has been delivered to a carrier for a destination in another state. It is much more difficult when the owner retains complete control of the transportation and can change his mind and divert the delivery from the intended interstate destination

as in the Champlain Co. case. The character of the shipment in such a case depends upon all of the evidential *circumstances looking to what the owner has done in the preparation for the journey and in carrying it out.*

The mere power of the owner to divert the shipment already started does not take it out of interstate commerce if the other facts show that the journey has already begun in good faith and temporary interruptions of the passage is reasonable and in furtherance of the intended transportation as in the Champlain Co. case.

Elsewhere in the opinion it is said: "The contract and the method of complying with it are all circumstances however throwing light on the question whether the transportation in interstate commerce (in our case exportation) began".

In cases like this where goods have been purchased for exportation and action has been taken in execution of that purpose it is not a question of whether any particular thing has been done, but of whether or not what has been done in furtherance of a contract of export has so far committed the goods to exportation that there is no reasonable probability that the proposed export will not be concluded; that there remains no reasonable question or hypothesis upon which their exportation can be doubted. I think that it can be said that when the tax was levied upon the materials in this case that it had become substantially certain that the mechanisms constituting the plant would be exported, as they subsequently were. This seems unquestionable when the facts as they existed March 5, 1944 (1945) are viewed from their several angles:

1. The materials of the plant became committed to export when the Bigge Company began dismantling the building. At that time the plaintiff had spent a great deal of time and effort in furtherance of his intention to export the whole plant. The firmness of its intention to export this property is shown by the fact that it would not commit itself to its purchase until it had obtained a license permitting its export. It had paid for the property. Before the Bigge Company had attached it the plant had been a complete manufacturing unit. Immediately thereafter it was in process of destruction as such; the complete demolition of the

structure was certain, the plaintiff was under contract to take it down and remove it from the premises. The plant could not have been re-erected upon its existing site; the plaintiff did not own it. At that time it was certain that what had been the building would soon be a mass of parts. In the circumstances it was certain that they would come to be such at the time the Bigge Company first went to work.

These parts when placed in some warehouse or laid out on some lot which the plaintiff might secure would be mere "scrap" and of merely speculative value for any purpose except for the use for which they were purchased.

I think that the payment for the property and proceeding to change it from parts in place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had "been started upon such transportation" with the degree of certainty demanded by Coe *v.* Errol and the many cases which have endorsed it.

In this case, stronger than in the Hughes Bros. case the first owner of the plant had been paid for his plant and it was at that time in the sole possession of the Plaintiff. Thus one source of uncertainty as to whether the purpose to export would be executed did not exist; the Kaiser Company could not prevent it. The only contingency upon which the export would be abandoned after the demolition of the building had become assured was therefore, that the plaintiff would abandon his purpose and sell the parts here at a substantial loss, or re-erect the plant in California where the plaintiff was not engaged in business. This suggests an improbable hypothesis. "There was not the slightest probability of any such change, and it did not occur" Spaulding Bros. *v.* Edwards, 262 U. S. 66.

In reaching this conclusion I am not considering the shipment of the twelve per cent of the property which was later exported as this fact was not certain at the time the Bigge Company began taking the building down.

2. If the exportation of the materials of the plant was not before assured, that became certain when the twelve per cent of the corpus of the building had been sent abroad.

In support of this conclusion I repeat all of the elements of certainty of export mentioned above and in addition I cite this circumstance. Whatever possibility there might have been that after plaintiff had torn the plant down and carried the parts off the premises that it would sell them or re-erect them into a plant in California would be rendered extremely improbable when it appeared that it had kept here only a part of the materials of the plant which of course could not be sold as the materials from which a plant could be built or used to reassemble the old one.

3. When the building was in process of demolition and twelve percent of its parts had been exported the entire plant was in process of "movement" toward the sea, as required by the source case of Coe *vs.* Errol. The plant was a unit composed of many parts. It was of great size and weight and could only be moved through moving the parts as they were moved here. When the first shipments were made from the plant we would not say that the contractors were moving a beam or a brace; we would say that they had begun to move the plant, that the entire property was in process of moving. It could not be said as part after part of the plant had been moved down to the last rod or pulley, that what was left had remained unmoved in a very appreciable way every abstraction from the building affected what was left. If a body of stevedores had been hired to unload a ship, at their first movement we would not say that they were moving a piano, or a sack of wool, we would say that they were unloading the ship. In this case when the plaintiff exported twelve percent of the plant and was in process of shipping the rest the movement of the whole plant toward the sea had begun, as in the Hughes Brothers case where the first logs were being "pushed" into the stream the whole mass was being pushed in.

For the reasons stated there could remain no reasonable doubt that at the time the tax was levied that the whole shipment would be made as it finally was.

"The means of shipment are unimportant as long as the certainty of the foreign destination is plain." Richfield Oil Co. *vs.* State, supra. Where the Court finds from the "circumstances" that an export trade had been actually

intended and carried through the Court will be liberal in construing the manner in which the export had been executed. Carson Petrol Co. *vs.* Vial, 279 U. S. 95.

The Judgment will be for the Plaintiff.

Appendix "B"

Decision of the Supreme Court of the State of California, June 15, 1948

EDMONDS, Justice.

The status of personal property sold to a foreign purchaser but in this state on tax day is the question presented for decision by the County of Merced upon its appeal from an adverse judgment in an action to recover taxes. Although part of the property had been prepared for export, the greater portion of it was not in that condition and all of it was located at the plant of the seller in Merced county.

The following facts were presented by stipulation. In November, 1944, Empresa Siderurgica, S. A., a corporation organized under the laws of Colombia, South America, agreed to buy from Henry J. Kaiser Company the machinery and equipment of a cement plant. The contract of sale provided that title to the property should be transferred to the purchaser whenever it had furnished a letter of credit and an export license issued by the appropriate governmental agency.

Early in January, 1945, the required license had been obtained and a satisfactory letter of credit covering the unpaid balance of the purchase price deposited with a bank. The work of dismantling the plant and packaging it for shipment was then commenced by Bigge Drayage Company, pursuant to a contract made by it with the purchaser's forwarding agent. The Bigge company conducts a general trucking business and is a common carrier by motor vehicle, licensed by the Interstate Commerce Commission to engage in interstate and foreign commerce.

The dismantling and packaging operations continued expeditiously, with due regard for war-time shipping condi-

tions, throughout the succeeding months, the packages being labeled at the plant site with the name of Empresa, as consignee. The specified place of delivery was Medellin, Colombia, South America. By March 5, 1945, the statutory date for the assessment of property for the tax year 1945-46, 12% of the plant had been shipped out of the county; 10% had been dismantled and crated or prepared for shipment; 34% had been dismantled but not crated or prepared for shipment; and 44% had not been dismantled. Not later than January 18, 1946, all of the machinery had been shipped out of the County of Merced on cars of the Atchison, Topeka, and Santa Fe Railway Company, and before the end of that month was enroute to South America by ocean carrier.

The original assessment, made upon the basis of the value of the entire plant, was reduced by the board of supervisors to require payment of taxes only upon the 88% of the plant which was in the county on tax day. Empresa paid under protest the amount of the tax computed accordingly.

The position of the county is that, on tax day, none of the property assessed had begun its journey to a foreign destination and, therefore, had not acquired the status of an export. Until the goods have been delivered to a common carrier for transportation, they say, such property is not an export and may be taxed. Empresa maintains that, at the time of the assessment, the plant was an export because by the agreement for the sale of the property the parties intended foreign shipment and neither party could prevent its exportation without breaching the contract. It is also argued that because of Bigge's license as a common carrier, the delivery of possession to that company was the same as delivery to a railroad or a ship; the foreign destination was fixed and if on tax day any part of the plant was an export, all of it came within that category.

Article 1, section 10, clause 2, of the Constitution of the United States provides: "No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . ." The trial judge determined, as a matter of law, that when the goods have been committed to exportation, a tax imposed upon them amounts to taxation of an export. Another basis for the decision was that "proceeding to change . . . (the plant) from parts in

place of a complete building, into a mass of disconnected materials made the completion of the exportation economically imperative. This was not a mere preparation of the plant for exportation; by such action and change the parts had 'been started upon such transportation' with the degree of certainty demanded by Coe *v.* Errol, (116 U. S. 547) and the many cases which have endorsed it."

Although the Coe case was based upon the commerce clause of the Constitution, the United States Supreme Court, has declared that the same rule applies to the export clause. (Ritchfield Oil Corp *v.* State Bd. of Eq., 329 U. S. 69, 79; Turpin *v.* Burgess, 117 U. S. 504, 506; Brown *v.* Maryland, 12 Wheat. (U. S.) 419.) Logs had been floated down a river to the town of Errol, where they were to be shipped in interstate commerce. The town's assessment of them was attacked upon the ground that, at the time of the levy, they were in such commerce and not subject to taxation. The court, in deciding against the property owner, stated that "no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State". (P. 527.) But it declared "that such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey. . . . It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many States there would be nothing but the lands and real estate to bear the taxes. Some of the Western States produce very little except wheat and corn, most of which is intended for export; and so of cotton in the Southern States. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the State. And so we think they continue to be until they have entered upon their final journey for leaving the State and going into another State. . . . But this movement does not begin until the articles have been shipped or started for transportation from the

one State to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another State, or committed to a common carrier for transportation to such State, its destination is not fixed and certain." (pp. 527, 528). These principles have been stated and followed in the few cases which have applied either Article I, section 10, clause 2, or Article I, section 9, clause 5 of the Constitution. (See Richfield Oil Corp. *v.* State Bd. of Eq., supra, p. 79.)

In Von Hamm-Young Co. *v.* City and County of San Francisco, 29 Cal. 2d 798, relied upon by Empresa, goods purchased in San Francisco and moved from the place of purchase to warehouses to await shipping space were held to be exempt from tax because of the commerce clause. It was there said that "the movement of the goods from the place of purchase to the warehouses must be considered a movement in interstate commerce . . ." (P. 807.) In the present case, there was no movement of the goods from the place of purchase. The Bigge company, which had the contract for dismantling and packaging, performed this function at the plant site. Eventually, the packaged goods were delivered to the railroad company, whose tracks ran alongside the plantsite, for transportation to the port of embarkation. But except for the 12% of the machinery which was not in the county on tax day, none of the packages had been delivered to the railroad carrier.

In the Richfield Oil Corporation case, supra, the court said: "The certainty that the goods are headed to sea and that the process of exportation has started may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose. But the same degree of certainty may exist though no common carrier is involved." (P. 82.) In that case the plaintiff corporation sold oil to the New Zealand government f.o.b. its tanker at Los Angeles for export to that country. Although title passed upon delivery to the tanker, sales tax was levied

against the gross amount of the sale. After payment, plaintiff sued for refund, invoking the exemption of section 10, Article I of the Constitution. The tax was held invalid because delivery to the purchaser's carrier constituted the commencement of exportation to the same extent as would delivery to a common carrier in the usual situation. The court stated, "Delivery was made into the hold of the vessel from the vendor's tanks located at the dock. That delivery marked the commencement of the movement of the oil abroad." (P. 83.) As in Coe *v.* Errol, supra, the determining factor was not the owner's intention to export but whether or not exportation had commenced.

On tax day, the machinery which is the subject of the assessment here under attack had been delivered into the possession of the forwarding agent for the purpose of packing and shipping it. But the preparations for shipment, including the preparation of foreign documents and bills of lading, negotiations for shipping space by rail and sea and incidental activities in readying the machinery for shipment out of the country are not the equivalent of delivery to a common carrier for transportation. The fact that the Bigge company was licensed as a common carrier in interstate and foreign commerce is not material, for it was not employed to performed the functions of such a carrier; it undertook only to dismantle and prepare the property for shipment. It cannot, therefore, be seriously contended that delivery of possession to Bigge was equivalent to delivery to a common carrier for transportation.

The property owner's argument that because 12% of the plant had been shipped out of the county and was clearly an export, the remaining 88%, whether dismantled and packaged or not, was likewise an export, cannot be sustained. This contention assumes that intention to export rather than the commencement of exportation is the determining factor. The fact that a portion of the plant had actually been shipped is not controlling as to that portion which was in the process of preparation for exportation, although there can be no question concerning the owner's intention to take it out of the country. "The exemption